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IN THE
COURT OF APPEALS OF INDIANA

BENJAMIN ZELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A05-0806-CR-384
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0705-FA-36

March 2, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Benjamin Zell appeals his conviction for one count of Child Molesting,[1] a class A felony. In addition, Zell appeals his sentence that was imposed after he was convicted of three counts of Child Molesting,[2] all class A felonies. Specifically, Zell argues that there was insufficient evidence to convict him of child molesting by performing or submitting to sexual intercourse as alleged in Count I. Furthermore, Zell maintains that the sixty-year aggregate sentence was inappropriate in light of the nature of the offenses and the character of the defendant. Finding no error, we affirm the judgment of the trial court.

FACTS

Zell is the father of R.Z., and spent every other weekend and summers with his daughter following his divorce from Katherine Zell, R.Z.'s mother. Beginning sometime around April 1, 2005, when R.Z. was only five years old, and lasting until September 30, 2006, Zell molested his daughter repeatedly. Specifically, Zell engaged in sexual intercourse with R.Z., inserted his fingers and tongue into R.Z.'s vagina, and placed his penis in her mouth.

In September 2006, R.Z.'s preschool teacher began to notice that R.Z. was "touchy feely with other children and liked to talk about things that she shouldn't be talking about with kids." Tr. p. 167. When asked about her sexual behaviors, R.Z. told her teacher that she had learned them from her father. Id. at 168. Five separate teachers approached their

[1] Ind. Code § 35-42-4-3.

[2] Id.

principal, Angela Mucker, to report R.Z.,'s inappropriate behavior. In each case, Mucker spoke to R.Z. about the behaviors and R.Z. told her, "my daddy does it. My daddy taught me this." Id. at 170-71.

Mucker contacted Katherine about the incidents and R.Z.'s allegations against Zell. When Katherine confronted R.Z. about the allegations, she admitted that they were true and described in detail how Zell had touched her. Katherine called Child Protective Services (CPS) in Cass County, where she lived with R.Z. Cass County CPS then contacted Allen County CPS, where Zell had been living.

On May 22, 2007, the State charged Zell with three counts of child molesting, all class A felonies. Count I alleged that Zell had committed child molestation by performing or submitting to sexual intercourse with R.Z., and Counts II and III alleged that Zell had committed child molestation by performing or submitting to deviate sexual conduct. Zell's two-day jury trial commenced on May 13, 2008, and he was found guilty on all three counts. At Zell's sentencing hearing, which commenced on June 13, 2008, the trial court concluded that Zell's violation of a position of trust and the serious impact on R.Z. were significant aggravating factors. In addition, the trial court found that Zell's prior criminal history to be an aggravating factor "not of particularly strong weight." Sentencing Tr. p. 19. In mitigation, the trial court noted Zell's past military service. After the trial court determined that "any one of these aggravating circumstances is equal to or greater than any or all of the mitigating circumstances found," id., it sentenced Zell to thirty years on each count, with Counts II and III to run concurrent with each other and consecutively to Count I, for an

aggregate sentence of sixty years imprisonment. Zell now appeals.

DISCUSSION AND DECISION

I. Insufficient Evidence

Zell argues that the evidence was insufficient to convict him of child molestation by sexual intercourse as charged in Count I. Specifically, Zell contends that the State failed to prove that he penetrated R.Z.'s "sex organ" as required by statute. Appellant's Br. p. 11.

When reviewing a challenge to the sufficiency of the evidence, this court will consider only the evidence favorable to the verdict and the reasonable inferences to be drawn therefrom. Walsman v. State, 855 N.E.2d 645, 648 (Ind. Ct. App. 2006). We will neither reweigh the evidence nor judge the credibility of witnesses and will affirm the conviction "if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt." Id.

Indiana Code section 35-42-4-3(a) provides in relevant part:

> A person who, with a child under fourteen (14) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits child molesting, a Class B felony. However, the offense is a Class A felony if:
>
> > (1) it is committed by a person at least twenty-one (21) years of age.

Indiana Code section 35-41-1-26 defines sexual intercourse as "an act that includes any penetration of the female sex organ by the male sex organ." Although the term "female sex organ" is not statutorily defined, this court has held that it includes the external genitalia, and

thus, it is not necessary that the vagina be penetrated. Short v. State, 564 N.E.2d 553, 559 (Ind. Ct. App. 1991).

In the instant case, when R.Z. was asked about the first thing that Zell did with his "pee pee," she testified that he "[p]ut it inside of my pee pee." Tr. p. 137. This is sufficient evidence that Zell penetrated R.Z.'s sex organ. See Sargent v. State, 875 N.E.2d 762, 767 (Ind. Ct. App. 2007) (holding that "[a] victim's testimony, even if uncorroborated, is ordinarily sufficient to sustain a conviction for child molesting").

Nevertheless, Zell maintains that because R.Z. did not define "pee pee," the jury could not reasonably conclude that penetration occurred. Appellant's Br. p. 12. We cannot agree. This court has held that "a conviction for child molesting will be sustained when it is apparent from the circumstances and the victim's limited vocabulary that the victim described an act which involved penetration of the sex organ." Smith v. State, 779 N.E.2d 111, 115-16 (Ind. Ct. App. 2002) (holding that the victim's testimony that her dad "put his private in my private" was sufficient evidence that penetration occurred). Moreover, "a detailed anatomical description of penetration is unnecessary." Id. at 115. Therefore, because R.Z. testified that Zell put his "pee pee" inside of her "pee pee," tr. p. 137, the jury could reasonably conclude that penetration occurred, and Zell's argument fails.

II. Inappropriate Sentence

Zell argues that the sixty-year aggregate sentence is inappropriate in light of the nature of the offenses and his character pursuant to Indiana Appellate Rule 7(B). In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d

858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Our Supreme Court has recently further articulated the role of appellate courts in reviewing a 7(B) challenge:

> Ultimately the length of the aggregate sentence and how it is to be served are the issues that matter. . . . And whether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case. . . . There is thus no right answer as to the proper sentence in any given case. As a result, the role of an appellate court in reviewing a sentence is unlike its role in reviewing an appeal for legal error or sufficiency of evidence. . . .
>
> The principal role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived "correct" result in each case. In the case of some crimes, the number of counts that can be charged and proved is virtually entirely at the discretion of the prosecution. For that reason, appellate review should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count.

Cardwell v. State, 895 N.E.2d 1219, 1224-25 (Ind. 2008) (footnotes omitted).

A person who commits a class A felony faces a sentence of twenty to fifty years, with an advisory sentence of thirty years imprisonment. Ind. Code § 35-50-2-4. Here, Zell was sentenced to the advisory sentence of thirty years on each count, with Counts II and III to run concurrent with each other and consecutive to Count I, for an aggregate term of sixty years imprisonment.

As for the nature of the offense, the trial court gave "significant aggravating weight"

to the violation of trust that Zell committed on "his young child" and "the very significant victim impact on the sexual behavioral issues that have been described of this child, that this child exhibits now as a result of this conduct." Sentencing Tr. p. 19. In addition, the trial court determined that his criminal history was an aggravating factor "not of particularly strong weight." Id. Moreover, although the trial court found Zell's military service to be a mitigating factor, it concluded that "any one of these aggravating circumstances is equal to or greater than any or all of the mitigating circumstances found." Id. Under these circumstances, we cannot conclude that the trial court's imposition of the advisory sentence on each count is inappropriate in light of the nature of the offenses.

The above analysis notwithstanding, Zell points out that there was only one victim in this case and cites to our Supreme Court's recent decision in Cardwell for the proposition that "[w]hether the counts involve one or multiple victims is highly relevant to the decision to impose consecutive sentences." 895 N.E.2d at 1225. Zell maintains that because there was only one victim, the trial court should have ordered all counts to run concurrently. Again, we cannot agree.

At the sentencing hearing, Katherine addressed the trial court and explained the effect of Zell's abuse on R.Z. She stated in part:

> [R.Z] spent only one month in kindergarten when she was five. Everyday [sic] I got a call [about R.Z.'s sexual behavior]. Parents were calling the school stating that they wanted that child removed and away from their children. . . . When she was five she did not have any friends to play with or to invite to the park and she never visited another kids [sic] home because parents did not want their child around a sexual child. When [R.Z.] was six she made sexual comments to our neighbors and

> then they built a fence between our houses so that [R.Z.] could not come over to play with their kids anymore and every time [R.Z.] came outside, they pulled their kids inside immediately to be away from her. . . . She has cried and cried over the past two years wondering what is wrong with her, why does no one want to play with me, momma. It breaks my heart to see other people punishing the victim and not the criminal.

Sentencing Tr. p. 8-9. As the State eloquently points out, "[t]he nature of the offense is horrendous given the extent of the harm that befell five-year-old R.Z., which tore away her innocence and leaves her questioning why no one will play her." Appellee's Br. p. 7-8. In short, the nature of the crimes warrants consecutive advisory sentences.

Zell also maintains that his sentence was inappropriate in light of his character. Specifically, Zell argues that although he has a criminal history, much of his history involves alcohol-related offenses. In addition, Zell points to his honorable military service and his statement to the trial court that he loved his daughter and that he was sorry they could not be together.

Although Zell correctly contends that much of his prior criminal history involves alcohol-related offenses, it does not follow that this is an indication of his good character. As a juvenile, Zell was found delinquent for public intoxication. Appellee's App. p. 3. Five years later, he was convicted of driving while intoxicated in North Carolina. Less than a year later, he was again convicted of driving while intoxicated in North Carolina. Id. In 2002, he was convicted of misdemeanor battery in Michigan. In April 2005, Zell was convicted of reckless driving and given one year of probation. Id. at 4. The instant offenses occurred sometime between April 1, 2005, and September 30, 2006. Thus, Zell was on probation at

the same time that he was molesting his daughter. Perhaps even more compelling, in December, 2006, Zell was convicted of operating while intoxicated and endangering a child in the vehicle, a class D felony. The child was R.Z., which means that Zell not only molested his daughter, but he also further endangered her by driving while intoxicated with her in the vehicle. We agree with the State that Zell's criminal history "shows a man who places his own gratification before the safety of others and who regards obeying the law as a trivial matter." Appellee's Br. p. 8.

As for Zell's honorable military history, we note that the trial court gave mitigating weight to this factor. Moreover, Zell's statement that he loves his daughter and is sorry that they cannot be together does not warrant that all counts be served concurrently in light of the fact that Zell repeatedly molested his daughter and has shown no remorse for his actions or for the consequences that they have had, and will continue to have on R.Z. As a result, we decline to disturb the sixty-year aggregate sentence that the trial court imposed.

The judgment of the trial court is affirmed.

NAJAM, J., and KIRSCH, J., concur.